

Service Date: August 15, 1995

DEPARTMENT OF PUBLIC SERVICE REGULATION
BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MONTANA

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IN THE MATTER OF the Petition of HAVRE)	UTILITY DIVISION
PIPELINE COMPANY, LLC for a Declaratory)	
Ruling on Public Utility Status.)	DOCKET NO. 95.2.5

DECLARATORY RULING

Introduction

1. On February 15, 1995 the Montana Public Service Commission (PSC) received a Petition for Declaratory Ruling on Public Utility Status from Havre Pipeline Company, LLC (Havre or Petitioner). Havre requested that the PSC determine what Havre's public utility status would be if it purchased natural gas gathering and transmission pipeline facilities from Northern Natural Gas Company (Northern). With this purchase, Havre would also acquire "farm tap" customers within the system.
2. On February 28, 1995 the PSC issued notice of the petition and opportunity to comment to the following parties: Montana Consumer Counsel, Montana Power Company, Montana-Dakota Utilities Company, Montana Land and Mineral Owners Association, Great Falls Gas Company, and Williston Basin Interstate Pipeline Company. Only Petitioner filed comments.
3. On July 11, 1995 Havre submitted its Supplemental Filing in Support of Petition for Declaratory Ruling. Havre informed the PSC that the Federal Energy Regulatory Commission (FERC) granted Havre's Petition for a Declaratory Order Disclaiming Natural Gas Act Jurisdiction, issued June 6, 1995. FERC determined that the pipeline facilities upstream of the inlet of the compressor stations will be exempt gathering facilities under section (1)(b) of the Natural Gas Act (NGA), and the remaining Montana facilities will constitute intrastate pipeline facilities as defined in section 2(16) of the Natural Gas Policy Act (NGPA). Havre also submitted additional factual data in support of its petition to the PSC, in particular documenting ownership status and clarifying limited liability corporate status of Havre.
4. Pursuant to § 2-4-501, MCA, and the procedures in ARM 38.2.101 and Model Rules ARM 1.3.226 through 1.3.229, the PSC exercises jurisdiction to make declaratory rulings binding on requesting parties as to the facts presented.

Facts Presented

5. UMC Petroleum Corporation (UMC), Havre's manager and owner of substantial working interests in the Montana properties served by Northern's System, executed an Asset Purchase Agreement with Northern dated December 16, 1994, and transferred the right to purchase Northern's System to Havre, as a recently organized limited liability company. Until the FERC's Order granting Northern authority to abandon its Montana facilities by sale to Havre, Northern had operated the System as an interstate pipeline subject to FERC's jurisdiction and provided "farm tap" service to farms subject to PSC jurisdiction.

6. Pursuant to its option to purchase, Havre intends to acquire, own and operate natural gas gathering and transmission facilities from Northern. Havre's members are Montana gas producers currently attached to the system, producing about 95 percent of the gas carried to market by the pipeline facilities. Havre intends to engage in intrastate gathering and transportation, along with interstate transportation authorized by section 311(a)(2) of the NGPA. Upon FERC's Order, Havre seeks a ruling from the PSC that portions deemed transmission facilities would be a "public utility," subject to the PSC's jurisdiction, but that its gathering portion would not be a public utility.

7. The System consists of 500 miles of pipelines located in Blaine, Chouteau and Hill Counties, Montana, and related facilities, including three compressor stations and more than 350 natural gas metering stations. Low pressure gathering lines of 3-inch to 20-inch pipelines (more than 400 miles) serve the three gathering systems in the Bullhook Tiger Ridge and Sherard production areas. Each gathering system collects gas at the wellhead and gathers it to a central point in the field. There the gas enters compression facilities which converge at the Blaine County No. 1 compressor station via 12-inch higher-pressure lateral pipelines. Gas is then delivered to connecting pipelines through either (a) a 46-mile, 16-inch high-pressure pipeline extending from the Blaine County No. 1 compressor to the U.S./Canadian border, or (b) interconnections with the pipeline system of Montana Power Company (MPC), an intrastate pipeline company serving Montana's gas customers. FERC has certified the two 12-inch pipelines, the 16-inch pipeline and the following three compressor stations, as transmission facilities: (1) the Blaine County No. 1 station -- two 5,500 horsepower reciprocating compressor units; (2) the Hill County No. 1 station -- one 1,460 horsepower compressor unit; and (3) the Blaine County No. 3 station -- one 750 horsepower compressor unit.

8. Havre proposes to engage in intrastate transportation, subject to transportation tariffs, for the portion of the System deemed to be transmission facilities by FERC, together with transportation

authorized by Section 311(a)(2) of the NGPA. Havre intends to operate solely as a gatherer and transporter of gas, and not as a purchaser and reseller of natural gas.

9. On both the gathering and transmission facilities Northern has a number of "farm tap customers," landowners receiving service as a result of easements and contractual agreements granting Northern the right to construct, operate and maintain pipelines across the customers' properties. Service is provided off a short connection, and the landowners are responsible for the pipeline to their premises. For the 12 months ending May 31, 1994, Northern's farm tap sales totalled 29,737 Mcf under rates approved by the PSC. Havre would assume the obligation to continue service under the farm tap tariffs, upon transfer of the facilities, and may arrange for acquisition of gas by purchase or through third-party contractors for sale to the landowners. Havre concedes the PSC's pipeline safety jurisdiction over intrastate pipelines as provided in 49 CFR Subchapter D, §§191, 192 and 199 (Pipeline Safety).

The Questions Presented

10. The petition presents the following questions of law for the PSC's determination:

Would the PSC have regulatory authority pursuant to § 69-3-102, MCA, over Havre Pipeline Company, LLC, as a public utility under the definition of § 69-3-101, MCA, if Havre acquired and engaged in intrastate operation of (1) those parts of the Montana Pipeline System deemed by FERC to be "transportation" and (2) those parts deemed to be lower pressure "gathering" systems? Would delivering natural gas to "farm tap" customers pursuant to easement agreements and in accordance with previous "farm tap" tariffs constitute Havre's pipeline system a public utility?

Applicable Law

11. Section 69-3-101(1), MCA, provides that the term "public utility":

[S]hall embrace every corporation, both public and private, company, individual, association of individuals, their lessees, trustees, or receivers appointed by any court, whatsoever, that now or hereafter may own, operate, or control any plant or equipment, any part of a plant or equipment, or any water right within the state for the production, delivery, or furnishing for or to other persons, firms, associations, or corporations, private or municipal:

(a) heat;

....

(d) power in any form or by any agency;

Pursuant to § 69-3-102, MCA, the PSC is "invested with full power of supervision, regulation, and control of such public utilities, subject to the provisions of [Title 69]"

Analysis

12. Havre inquires whether the PSC would have jurisdiction over Havre for the intrastate natural gas activities of gathering, transmission and "farm tap" service. Havre maintains that the gathering function of the System on the low pressure lines would not submit Havre to regulatory oversight so long as Havre is not a reseller of the natural gas. Havre is willing to accept regulatory jurisdiction over intrastate transportation of natural gas for others and to submit tariffs for PSC approval. Havre is equivocal on regulation of "farm tap" service.

13. To support its position on the distinction between the gathering and transmission portions of its proposed natural gas pipeline system, Havre cites definitions from case law.

The term "gathering" refers to the process of collecting gas at the point of production (the wellhead) and moving it to a collection point for further movement through a pipeline's principal transmission system.

"Transportation" involves the movement of gas through a pipeline's principal transmission system. Transportation facilities which receive natural gas after gathering may conduct transportation in interstate commerce, which is subject to [FERC's] jurisdiction under § 1(b), or transportation in intrastate commerce, which is excluded from [FERC] regulation under the NGA.

Northern Natural Gas Company, Div. of Enron vs. F.E.R.C., 929 F.2d 1261 (8th Cir. 1991).

Gathering

14. In gathering, the producers do not sell their gas to Havre; there is no change in ownership. Havre would provide private gathering service to the compressors for its members. At that point, the movement would become "transportation" like that provided by MPC pursuant to tariffs, and Havre would charge tariffed transportation rates, if the declaratory relief is granted.

15. Montana Power Company (MPC) first applied to the PSC to establish new transportation rates in Docket No. 90.1.1. After a rate hearing and settlement negotiations, the PSC granted MPC's request to implement transportation rates. (Order No. 5474c, October 3, 1991.) In Order No. 5474c (¶¶ 5-6), the PSC discussed a "fully-bundled service (MPC's traditional and present service)" in which "the total of procurement, production, processing, storage, supply, transmission, delivery, and all other related aspects of natural gas service are a package to the customer -- MPC provides natural gas as a product and service to the customer's burner tip." The PSC contrasted this full service with an unbundled service in which the components become separable and customers can choose one or more services.

16. Producers acting like producers, gathering and collecting their gas for market, are not performing a public utility function. If, however, the producers provide what looks like a product with service, the PSC would examine the matter to determine public utility status. Havre would own the facilities, which is the first prong of public utility status. Havre would not use the gathering facilities to provide utility service to others, the second prong. The gathering would be a private collection service for private producers to a privately owned central compression point. There would be no end-user, and therefore no public utility status to the point of the compressors. Producing and gathering would not be regulated as a public utility service, as discussed in the MOGA declaratory ruling. The PSC determines that the gathering function of Havre's system would not be regulated.

Transportation

17. "Transportation" of gas for purposes of pipeline safety and intrastate gas transportation as a public utility function have different meanings. Title 49 CFR § 192.3 (pipeline safety) provides encompassing definitions, including all aspects of the movement of gas by pipeline. The PSC has pipeline safety enforcement jurisdiction over intrastate pipelines, with penalty provisions under § 69-3-207, MCA. This jurisdiction extends to the full gamut of intrastate transportation as defined under the pipeline safety provisions, including high-pressure gathering, transmission, distribution of gas by pipeline and limited jurisdiction over the storage of gas.

18. "Transportation" of gas in conjunction with tariffs has a more limited meaning, referring to the transportation service unbundled from an integrated utility service. Havre requests authority to provide transportation service similar to that which MPC provides according to tariffs. When MPC applied for approval of transportation rates in 1990, the PSC considered the request as a matter of first impression. (Docket No. 90.1.1, Order No. 5474c.) MPC's concern was that large customers capable of finding alternatives to traditional service would bypass the system. MPC maintained that bypass would harm remaining customers, while unbundling service into separate services, such as transportation, would benefit MPC and its remaining customers by sharing some system costs. (Order No. 5474c, ¶ 5.)

19. In addition to the issue of bypass, the PSC considered the federal trend toward unbundling of transportation and sales. In 1978 Congress enacted the Natural Gas Policy Act (NGPA) removing FERC's jurisdiction of prices at the wellhead and authorizing FERC to allow interstate and intrastate pipelines to transport gas in interstate commerce without certificate and abandonment requirements. FERC implemented procedures to promote open access transportation by interstate pipelines in 1985 in Order No. 436. The interstate natural gas industry was changing to an unbundled transportation and sales business with companies transporting gas for shippers for a fee. (Order No. 5474c, ¶¶ 13-17.)

20. The PSC found that the natural gas industry was evolving from a fully-bundled, regulated business to an unregulated supply business, with an unbundled, but regulated, transportation business. The PSC also found that gas transportation would allow the marketplace to determine the price of natural gas in Montana, provide more supply options, and allow fuller use of MPC's pipeline system, increasing revenues to contribute to offset fixed transmission costs for all customers. (Order No. 5474c, ¶¶ 58 and 62.) Transportation customers "would be responsible for procuring their own gas supplies and contracting with MPC for transportation of their gas supplies to their delivery points on MPC's system. Customers could select from the menu of unbundled transportation features (including transmission and storage functions) which they deemed necessary to properly transport and shape their gas supplies for their requirements." (Order No. 5474c, ¶ 79.)

21. Montana Oil and Gas Association (MOGA), independent gas producers opposed to gas transportation, requested a declaratory ruling in anticipation of Order No. 5474c. MOGA asked whether §§ 69-3-101 and 69-3-102, MCA, would apply to independent producers selling gas to selected industrial end-users transporting on MPC's facilities, if the PSC approved MPC's transportation proposal. The PSC never regulated gas producers for producing and selling gas in the field. The producers did not want to turn the act of selling gas at the wellhead into a public utility function by using MPC's transportation facilities. The PSC ruled that public utility status under § 69-3-101, MCA, requires the ownership, operation or control of the facilities and provision of service on these facilities to someone other than the gas producers. Producers, acting like producers, would remain unregulated. A producer could be subject to regulation as a public utility for a contractual agreement to sell to another, if the producer owned, operated or controlled the facilities and engaged in delivery of the gas to the end-user/purchaser.

22. As the only intervening party not to approve the settlement in Docket No. 90.1.1, MOGA maintained that MPC was a distribution system only and not a transmission system. MOGA expressed concern that its producers would have to go through two or three systems, paying multiple transportation charges. (Order No. 5474c, ¶¶ 37-45.) MPC maintained that the producers in a competitive environment would have more opportunities to reach markets for gas supplies. (Order No. 5474c, ¶¶ 46-47.) The PSC concluded that Montana producers would have more opportunities to sell to others under gas transportation and open access. (Order No. 5474c, ¶¶ 66-70.)

23. Pursuant to its authority under § 69-3-102, MCA, the PSC will have jurisdiction over Havre's transportation rates upon Havre's acquiring the Northern pipeline system. As defined in § 69-3-101, MCA, Havre would own plant and equipment for transportation of the natural gas to others. Havre would submit transportation tariffs similar to those of MPC and provide transportation service

accordingly. Havre states that it will not purchase or resell the gas, thereby providing only the transportation component and not a full utility service.

Farm Taps

24. Havre requests the same level of regulatory oversight as exists over Northern's farm tap tariffs. While it "acquiesces" to continued "light-handed" oversight, Havre maintains that deliveries to farm tap customers after Northern's sale to Havre would have a different character and would no longer have any public utility status. According to Havre, Northern has delivered its own gas to the farm tap customers, but Havre would own no gas. Havre would either have to purchase gas for farm tap delivery or arrange for the transfer of the farm tap gas delivery obligation to a third party.

25. If Havre purchased gas for farm tap deliveries, Havre contends that it could "avoid public utility status" if the PSC ruled either (1) that there were no actual deliveries to the public, or (2) that Havre would not be providing service to the burner tip but rather a license to tap into its pipelines to remove gas.

26. To avoid public utility status, Havre cites Re Lake-Hubbard Natural Gas Service, PSC Docket No. 995, P.U.R. 1928C 358 to support its contention that "farm tap deliveries are not sales to the public." The 1928 PSC held that the principal issue was whether the property was dedicated to a public use, which would bring the owner of the pipeline facility under the jurisdiction of the PSC. Distributing gas to users for compensation would not subject the owner of the facilities to regulation, without a profession of public service and the willingness to serve at least a limited portion of the public, said the 1928 PSC. The PSC further stated that willingness to serve only particular individuals, either as an accommodation or for other unique reasons, would not subject the owners of the facility to public utility regulation.

27. The PSC rejects Havre's reasoning that it would not be professing public service, but merely serving particular individuals for reasons of accommodation or otherwise. The reliance on a 1928 case is misplaced. The pipeline owners and developers (Lake and Hubbard) would be regulated today for the 1928 service to the end-user for which they received compensation. The PSC has since construed "public utility" § 69-3-101, MCA, in numerous decisions and orders to mean an entity providing service to an end-user (furnishing or delivering heat, light or power, including natural gas) on facilities it owns, operates or controls.

28. The farm tap service constitutes just such a utility service under the definition, i.e., delivery of natural gas on facilities owned by Havre to the end-user farmers. MPC also provides this service at set tariffs, similarly in exchange for pipeline easements. All the components of service are

present. The farm tap customers on the gathering and transmission lines receive service on distribution lines to the service lines up to the customer meters. A customer meter measures the transfer of gas from an operator to a consumer. The service lines providing farm tap service are generally very short, just a few feet to place the meter and appurtenant equipment. The operator provides service to this meter or to the customer's piping, whichever is farther downstream. If there is no meter, the service line extends to the customer's piping. Under the farm tap tariffs, the customer's piping is right at the meter where the gas is transferred. The customer then pipes the gas, sometimes across hill and dale, to the premises.

29. The PSC finds that the farm tap service is indeed a public utility service. Components of full service are present, albeit it off a gathering system and limited to the few short feet of service line per each farm tap connection. Upon Havre's acquiring the system, the PSC would continue to regulate the farm tap service pursuant to the tariffs. The PSC further finds that pipeline safety enforcement would apply to the system, consistent with pipeline safety requirements.

DECLARATORY RULING

On the petition of Havre Pipeline Company, LLC, for a declaratory ruling assuming that Havre exercises its option to acquire the pipeline facilities of Northern Natural Gas Company, the PSC rules as follows:

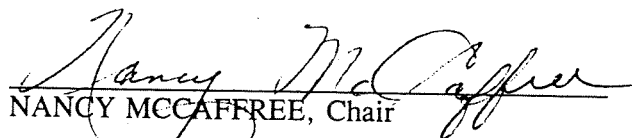
(1) Gathering system. The PSC would not regulate the gathering portions of the pipeline system, so long as the producers are acting like producers, collecting the gas at the well-head and gathering it to the collection points, i.e., the compression facilities. Havre has stated that this service is private carriage, because the ownership of the gas has not changed. This decision on the gathering system is based on the fact that gathering itself has never been regulated as a public utility function.

(2) Transportation system. Havre has agreed that the PSC would exercise jurisdiction over the transportation component of its pipeline system. Havre must file transportation tariffs upon acquiring the system.


(3) Farm tap service. The PSC would continue to exercise jurisdiction over the farm tap service pursuant to the tariffs filed at the PSC by Northern, regardless of the form of acquisition of this portion of the system.


Done and Dated this 8th day of August, 1995 by a vote of 5-0.

BY ORDER OF THE MONTANA PUBLIC SERVICE COMMISSION


NANCY MCCAFFREE, Chair



DAVE FISHER, Vice Chair


BOB ANDERSON, Commissioner


DANNY OBERG, Commissioner


BOB ROWE, Commissioner

ATTEST:


Kathlene M. Anderson
Commission Secretary

(SEAL)

NOTE: Any interested party may request the Commission to reconsider this decision. A motion to reconsider must be filed within ten (10) days. See ARM 38.2.4806.